21-1672-cv

United States Court of Appeals

for the

Second Circuit

EMILY KERN, as administrator of the Estate of RILEY PARKER KERN and EMILY KERN, Individually,

Plaintiff-Appellant,

– v. –

POLICE CHIEF DANIEL CONTENTO, POLICE OFFICER IAN FOARD, POLICE OFFICER JONATHAN E. MYERS, TOWN OF COEYMANS,

Defendants-Appellees,

TRAVIS D. HAGEN, RAVENA CLUB INC., DBA Sycamore Country Club,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction over Ms. Kern's suit under 28 U.S.C. §1331 by reason of federal questions involving 42 U.S.C. §1983 and §1988 and under 28 U.S.C. §1332 by reason of the diversity of the citizenship of the parties. (Appendix at A-6 to A-7 hereinafter "A-__"). This Court has jurisdiction under 28 U.S.C. § 1291 of final decisions of the District Courts. Plaintiff seeks review of the June 11, 2021, Decision and Order of Judge Gary L. Sharpe ("Judge Sharpe"). (A-133 to A-145). A final judgment of dismissal was entered against Defendants-Appellees on July 26, 2021, the same day as Judge Sharpe certified his June 11, 2021 Decision and Order as a final judgment for appeal under Rule 54(b). (A-146). Plaintiff's notice of appeal was timely filed on July 7, 2021. (A-148)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the United States Constitution bars police officers from covering up evidence, intentionally failing to carry out a statutorily required police investigation and failing to performing a mandatory field sobriety test ('field testing") for the purpose of shielding an individual and a dram shop from civil liability related to the wrongful death of a person?

II. Whether plaintiff's complaint, which seeks relief pursuant to 42 U.S.C. §1983, plausibly alleged (1) a procedural due process violation where she alleged that Police Officers purposefully failed to perform the mandatory duties imposed by New York Vehicle and Traffic Law ("VTL") §603-a that were enacted to benefit the families of

those killed by intoxicated drivers; (2) a violation of her right of access to the courts where Police Officers' intentional conduct took from her the evidence necessary to hold an individual and dram shop civilly liable for the death of her son, and (3) a *Monell* claim against the Town of Coeymans ("Coeymans") when its police chief participated in and directed the activity and its police department had a history of similar misconduct?

Answer: The District Court erred on each of the above issues.

STATEMENT OF THE CASE

A. Nature of the case and procedural history

Plaintiff-Appellant Emily Kern ("plaintiff" or "Ms. Kern") is the mother and administrator of the estate of Riley Kern who died on July 27, 2018 as a result of injuries sustained in a motor vehicle accident. (A-7 to A-9). Defendants-Appellees, Police Chief Daniel Contento, Police Officer Ian Foard, and Police Officer Jonathan E. Myers ("Police Officers"), employees of Coeymans, used their positions as police officers to dispose of evidence and fabricate a false narrative as to occurrence of the motor vehicle accident. (A-6 to A-35). As a result of Police Officers' intentional conduct, Ms. Kern does not have evidence allowing her to reconstruct how the accident occurred to prove that Mr. Hagen is liable for causing the death of her son Riley. (A-22 to A-33). Likewise, the Police Officers' actions resulted in the permanent loss of evidence of intoxication which is necessary to hold the Sycamore

Club liable on plaintiff's dram shop cause of action and to hold Mr. Hagen liable for punitive damages. (A-22 to A-33).

Plaintiff's complaint, filed on July 23, 2020, sought relief premised on 42 U.S.C. §1983 alleging (1) field sobriety testing ("field testing") mandated by VTL §603-a (A-11 to A-12) provided her with a constitutionally protected property interest (A-6 to A- 32); (2) Police Officers' intentional disposal of evidence and fabrication of a false narrative for the purpose of shielding Mr. Hagen and Sycamore Club from civil liability violated her constitutionally protected right of access to the courts (A-6 to A-35) and (3) a *Monell* claim against Coeymans. (A-35 to A-38).

On November 13, 2020, Defendants-Appellees moved to dismiss the plaintiff's complaint pursuant to Rule 12(b)(6). (A-66 to A-89). On November 30, 2020, Plaintiff filed a Memorandum of Law in Opposition to the Motion (A-90 to A-121). On December 17, 2020, Defendants- Appellees filed a Memorandum of Law in reply. (A-122 to A-133). By decision and order dated June 11, 2021, Defendants-Appellees' motion to dismiss was granted by Judge Sharpe. (A-133 to A-145.) *Kern v Hagen*, 2021 US Dist LEXIS 109623, at *1 (N.D.N.Y. 2021).

B. Facts relevant to the issue presented

The subject accident occurred on July 27, 2018, at about 6:15 pm, when Riley's motorcycle and Mr. Hagen's truck collided at or about the intersection of Route 143 and Tomkins Road in the Town of Ravena, State of New York

("intersection"). (A-8). This intersection is directly adjacent to the Sycamore Club, a dram shop licensed to sell and serve alcohol. (A-9 & A-10). The intersection is controlled by a stop sign for vehicles seeking to enter Route 143 from Tomkins Road. (A-9). At this intersection, a person who had left Sycamore Club would be required to stop and yield to vehicles traveling on Route 143 before entering Route 143. (A-10). Objectively reasonable grounds existed to believe that Mr. Hagen had been drinking at Sycamore Club, failed to stop at the stop sign, and caused the accident which caused Riley's death. (A-8 to A-15).

On July 27, 2018, Mr. Hagen was a member of Sycamore Club and regularly frequented and consumed alcohol at Sycamore Club. (A-10). The Sycamore Club hosted a yearly memorial golf tournament in honor of Mr. Hagen's father, Terry Hagen, which was scheduled to be held at Sycamore Club on August 19, 2018. (A-9 & A-10). Mr. Hagen regularly passed through the subject intersection to get to and from Sycamore Club. (A-10). Mr. Hagen was known to law enforcement officers and had brushes with the law. (A-15 & A-24). Mr. Hagen had a reputation in the community for alcohol consumption. (A-15). Mr. Hagen's Facebook pages indicates that he drank alcohol excessively. (A-24). While Mr. Hagen had ties to the local community, Riley Kern was from Kansas. (A-7).

Following the accident, Police Officers responded to the scene, and it was apparent that Riley was hurt badly, had a low pulse, was in "10/10 sharp" pain and

had sustained life-threatening injuries. (A-8, A-9, & A-14). Riley died at Albany County Medical Center at 10:33pm that day as a result of the injuries. (A-9). Police Officers, to purposely shield Mr. Hagen and Sycamore Club from civil liability to plaintiff, did not initiate field sobriety testing of Mr. Hagen, failed to preserve photographs, take measurements, notify the on-call detective, or collect any evidence whatsoever which resulted in the loss of all forensic evidence.[1] (A-8 to A34). Police Officers did not get statements from bystanders or even record the name and contact information of a woman in nurse scrubs who Ms. Kern learned was at the scene of accident. (A-17). Ms. Kern was told that the only evidence preserved by CPD was the license plate from Riley's motorcycle, but CPD refused to give her the license plate. (A-27). Police Officers failed to impound Mr. Hagen's truck (A-18) and allowed Mr. Hagen to have the truck repaired. (A18-A19). The MV-104A prepared by Police Officer Foard, and approved by Police Chief Contento, contains a false narrative of how the accident occurred and lists as the witness a Michael J. Byerwalter Sr., who Ms. Kern learned from Gary and Ellie Goodman, did not witness the accident or know what happened. (A- 21 & A - 23).

Ms. Kern sought to confront Police Chief Contento with the false statements in the MV-104A, but he did not return her calls. (A-23). On or about October 15, 2018, Ms. Kern traveled from Kansas to meet with Police Chief Contento, but he was

[1] Plaintiff's 35-page complaint is attached in the Appendix at A-6 to A-41.

unavailable to meet with her. (A-23). On or about February 11, 2019, Ms. Kern, after months of attempts to speak to Police Chief Contento, finally spoke to him on the telephone and he falsely told her that that he was not at the scene of the accident. (A-25). Likewise, the Coeymans Police Department ("CPD") and Coeymans Town Supervisor and Counselman all ignored her and acted with deliberate indifference to her repeated requests for accurate information and the amendment of the MV-104A report CPD filed with DMV. (A-23 to A-28). Ms. Kern has alleged, based upon a photograph of Police Chief Contento at the accident scene, that he falsely told Ms. Kern that he was not at the scene to distance himself from the police misconduct. (A-25).

The MV-104A narrative does not indicate that Mr. Hagen had left the Sycamore Club and was turning onto Route 143, but rather states that Riley and Mr. Hagen were traveling opposite direction on Route 143 and Riley lost control of his motorcycle and "laid" it down in front of Mr. Hagen who then ran it over. The MV-104A narrative reads (A-21):

> V1 [RILEY's motorcycle] was traveling around a curve at high rate of speed and the operator of V1 lost control of the vehicle and laid his motorcycle down. V2 [Mr. Hagen's truck] was traveling Northbound on Route 143 and as V1 came around the curve it traveled into the Northbound lane in front of vehicle V2. V2 swerved to avoid impact and struct V1. The operator of V1 was ejected and struct the rear driver side of V2. V1 traveled under v2 causing damage to the underside of V2 and eventually ending up behind V2. Operator of V1 did pass away from crash related injuries at Albany Medical Center. Witness #1 Michael J.

Byerwalter Sr, 326 Alcove Road, Coyemans, NY 12045 (518) 369-1093.

In August 2019, plaintiff was advised by Beau A. Biller, P.E. of Cummings Scientific, LLC there was not enough evidence to reconstruct the accident but stated that the damage to Riley's motorcycle was not consistent with it having been run over by Mr. Hagen's truck. (A-22). Ms. Kern requested information from Police Officer Foard about the happening of the accident and he lied to her not just about Mr. Byerwalters being a witness and how the accident occurred, but also falsely told her it was rainy when it was not and that Riley was unconscious and that the officers had to look in Riley's bag to find his name even though Riley was alert and oriented at the scene according to the first responders. (A-22 to A-26).

On or about October 16, 2018, Ms. Kern met with Albany County Sheriff Craig Apple to report the Police Officers' misconduct. (A-24). On March 28, 2019, Police Chief Contento, perhaps after being contacted by Sheriff Apple, spoke to Ms. Kern and admitted to her that Mr. Byerwalter did not witness the accident (A. 26). As such, it was now admitted by Chief Contento that the filed police MV-104A narrative falsely indicated Mr. Byerwalter as a witness. (A-25 to A-27).

Not only did Police Officers fail to preserve evidence and fabricate a false narrative as to how the crash occurred, they also failed to carry out statutory duties, including field testing, required by New York Vehicle and Traffic Law §603-a ("VTL §603- a"), CPD's Law Enforcement Manual ("LEM"), and good police

practices. No reasonable police officer would have believed that they were not obligated by law to investigate the motor vehicle accident, obtain proof related to intoxication, and preserve all evidence.[2] (A-11 to A-16).

The duties of police officers pursuant to VTL §603-a became mandatory when Governor Andrew Cuomo signed into law "AN ACT to amend the vehicle and traffic law, in relation to mandatory testing in the event of a motor vehicle collision resulting in injury or death." New York bill S. 5562-A and A. 7572. (A-11). The title of the bill and its legislative history establishes that VTL§603-a was amended to make mandatory field testing to benefit the families of those seriously injured or killed by intoxicated drivers. (A-11 to A12). New York State Governor Andrew Cuomo issued a memorandum on the signing of the bill into law that stated "[i]mpaired drivers who cause serious accidents must be held accountable for their actions." (A-11).

The sponsoring State Senator, Pam Helming, recognized that New York Police Officers had an abysmal record of field testing the surviving drivers of fatal motor vehicle crashes and she noted in her memorandum in support of the bill under justification that:

[2] Including photographing the location to depict skid-marks, fluids, location of debris, and damage, impounding the vehicles, accident debris, obtaining the "event data recorder," recording pertinent measurements, taking statements from all involved and others with knowledge of pertinent facts. (A-11-A16).

> all too often, intoxicated drivers who are involved in motor vehicle crashes escape prosecution. New York State has been found to test a small amount of surviving drivers who were involved in fatal crashes for their blood alcohol concentration. Almost ¼ of all drivers in fatal crashes are impaired by alcohol. Only two states reported testing a smaller percentage of surviving drivers involved in fatal crashes. **This legislation requires a mandatory chemical test be performed when there is a serious personal injury or a death as a result of a motor vehicle accident** [emphasis added]. (A-11-A12)
>
> Senator Helming stated upon the bills passing:
>
> too often, individuals will get behind the wheel of their cars after consuming drugs or alcohol without thinking of the consequences of their actions. Driving under the influence needlessly places lives at risk and all too frequently ends in tragedy. There is simply no excuse for drunk or drugged driving. That is why I am proud to announce that the Senate recently passed my amended legislation to require police to request field sobriety testing to be performed in cases where motor vehicle accidents result in serious personal injury or death. If the driver refuses the testing, the police must include this information in the report. It will ultimately lead to suspension of their license. This legislation is about keeping our communities' safe. **We owe it to the families of those killed in these tragedies, to bring drunk drivers to justice and hold them fully accountable for their reckless actions!!** [Emphasis added] (A-12).

A successful criminal prosecution would result in full accountability and civil liability to the families on Res Judicata grounds. See *Hartman v Milbel Enters., Inc.*, 130 A.D.3d 978 (2 Dep't 2015). New York State amended VTL§603-a with the express purpose of providing "families of those killed in these tragedies [with a means] to bring drunk drivers to justice and hold them fully accountable for their reckless actions." (A-12).

Police Chief Daniel Contento was a policy maker for the Town of Coeymans and he participated in and made the decisions that resulted in the constitutional violations alleged. (A-35). Furthermore, CPD had a history of misconduct which included not preserving and fabricating evidence in connection with motor vehicle accident investigation to shield favored responsible parties. (A-36 to A37).

CPD's prior misconduct was documented in the case *Kryzkowski v. Town of Coeymans*, 2008 U.S. Dist Lexis 95907 (2008). *Kryzkowski* arose out of a police chase of David McCauslin ("McCauslin") and Jason Krzykowski ("Krzykowski"), who were on dirt bikes, which resulted in McCauslin's death and serious injuries to Krzykowski. *Krzykowski v Town of Coeymans*, 2008 US Dist LEXIS 95907, at *1. Plaintiff in *Kryzkowski* brought a substantive due process claim and submitted proof to Judge Sharpe evidencing that CPD planted evidence at the *Kryakowski* accident scene to falsely implicate alcohol use and that CPD failed to protect and preserve evidence indicating how the accident occurred. Judge Sharpe granted summary judgment in favor of the Town of Coeymans and its officers but noted in his opinion "the Coeymans Police Department failed to properly investigate the crash scene after the accident." *Kryzkowski,* 2008 U.S. Dist Lexis 95907 at *6. CPD's conduct in *Kryzkowski* is relevant to the instant matter because in both cases CPD did not preserve evidence necessary to prove liability and the officers fabricated evidence. (A-37); *Kryzkowski v. Town of Coeymans*, 1:06-CV-835 (GLS/DRH) at Dkt No. 40

Plaintiff's Opposition to Motion for Summary Judgment at pages 12-15 and Exhibit 9 at pages 57 – 79, 101, 160, Exhibit 10 at page 28, 127, 143 and 145, Exhibit 13 at pages 66-67, and Exhibit 23. CPD misconduct further evidenced itself a few months before the subject accident when its police officers recklessly used police vehicles to chase and kill a raccoon in a crowded parking lot. (A-37).

Police Officers covered up the evidence and fabricated a false narrative as to the cause of Riley's untimely death on July 27, 2018. (A-8 to A-34). The Police Officers' conduct was not negligent, but purposeful conduct undertaken to shield Mr. Hagen and the Sycamore Club from civil liability. (A-8 to A-34). Ms. Kern's complaint alleges state law causes of action against Mr. Hagen for wrongful death and conscious pain and suffering and sought compensatory and punitive damages. (A-38 to A-39). Plaintiff also alleged a dram shop cause of action against Sycamore Club. (A-39 to A-40). Mr. Hagen and Sycamore Club have filed answers which deny her allegations (A-3 to A-4 Dkt Nos. 10 & 20). Mr. Hagen has further asserted an affirmative defense asserting that he was not negligent, and that the accident was caused by Riley's negligence. (A-3 Dkt No. 10 at ¶4). Ms. Kern, however, does not have knowledge of the crucial facts, including how the crash occurred and Mr. Hagen's blood alcohol content. (A-6 to A-35). As such, Ms. Kern has been impaired by Police Officers' conduct because she does not have proof that will allow her to hold Sycamore Club liable on her alleged dram shop cause of action and/or proof that

will allow her to be able to hold Mr. Hagen fully responsible for the motor vehicle crash and recover punitive damages from him. (A-6 to A-35).

SUMMARY OF ARGUMENT

The District Court erred in three significant ways. The first was in failing to recognize that field sobriety testing became mandatory on or about April 18, 2018 when New York passed "AN ACT to amend the vehicle and traffic law, in relation to mandatory testing in the event of a motor vehicle collision resulting in injury or death," and in holding that *Harrington v. County of Suffolk*, 607 F3d 31 (2d Cir 2010) and *Stevens v. Webb*, 2014US Dist LEXIS 37874, at *2 (E.D.N.Y. 2014), No. 12-CV-2909 were controlling when those cases involved accidents that occurred years before New York amended VTL §603-a to make field testing mandatory.

The second significant error of the District Court was in holding that a plaintiff must allege "conclusive foreclosure" of the underlying claims to state a cause of action for violation of her right of access to the courts (A-142). The Second Circuit in *Oliva v Town of Greece* 630 F App'x 43 (2d Cir 2015) specifically rejected the "conclusive foreclosure" standard and held that a plaintiff states a claim if he sufficiently alleges that official acts had the actual effect of frustrating the plaintiff's effort to pursue a legal claim, or have caused the loss or inadequate settlement of meritorious case, the loss of an opportunity to sue, or the loss of an opportunity to seek some particular order of relief. *Oliva*, 630 F App'x at 44 – 45.

The third significant error of the District Court was in holding that the Police Officer's conduct was merely negligent when plaintiff alleged intentional conduct undertaken to shield Mr. Hagen and Sycamore Club from civil liability. The second and third errors of the District Court are reflected in the following portion of the District Court's decision (A-142):

> "Indeed, although the allegedly negligent investigation by Town defendants may impair Kern's ability to "reconstruct the accident and prove [Hagen] responsible" and succeed on her state law causes of action, (Dkt. No. 22 at 17-22), such claims have not been completely foreclosed. See *Oliva v. Town of Greece*, 71 F. Supp. 3d 368, 375 (W.D.N.Y. 2014), aff'd sub nom. *Oliva v. Town of Greece*, 630 F. App'x 43 (2d Cir. 2015)."

Lastly, plaintiff submits that the Second Circuit, which has only assumed that backwards-looking right of access claims are viable in Circuit, should now hold that such claims are viable in the Circuit. *Oliva,* 630 F App'x at 45.

In summary, plaintiff's well-plead factual allegations in her first, second and third causes of actions easily meet the low bar for pleading set by *Iqbal-Twombly* and state causes of action against the Police Officers for violation of her procedural due process rights, and right of access to the courts, and *Monell* liability as against Coeymans. As such, this Court should reverse the District Court's decision and order.

STANDARD OF REVIEW

This Court "review[s] de novo the dismissal of a complaint under [Federal] Rule [of Civil Procedure] 12(b)(6), accepting all factual allegations as true and

drawing all reasonable inferences in favor of the plaintiff." *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 119 (2d Cir. 2013).

STANDARDS FOR PLEADING AND RULE 12(B)(6) MOTION

Federal Rule of Civil Procedure 8(a)(2), provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). To avoid dismissal, a complaint must only contain enough facts to state a claim for relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544; 127 S. Ct. 1955 (2007). "[A] 'plausible' claim contains 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 114 (2d Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Under Rule 12, a complaint that states a plausible version of the events cannot be dismissed merely because the court finds a different version more plausible. *Anderson News, L.L.C.v. Am.Media, Inc.*, 680 F.3d 162 (2d Cir. 2012). The plausibility standard is not akin to a probability requirement and a complaint has facial plausibility if it pleads facts that allow the court to infer that the defendant is

liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009).

The court's function under Rule 12(b)(6) motion is to assess the complaint's legal feasibility, not the weight of the evidence which might be offered in support thereof. *White v. Moylan*, 554 F. Supp.2d 263 (D. Conn. 2008); *Mytych v. May Dept. Store Co.*, 34 F. Supp. 2d 130 (D. Conn. 1999). Where different inferences can be drawn from the allegations, the resolution of these differing inferences is for the jury, not the court. *Del Col v. Rice*, 2012 U.S. Dist. LEXIS 179095 (E.D.N.Y.2012). The Court must accept plaintiff's allegations as true, drawing all inferences in the best light for the plaintiff, and if that light reveals a scene in which it is plausible that the defendant can be held liable, a Rule 12(b)(6) motion must be denied. *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41 (2d Cir. 2003); *Morgan v. County of Nassau*, 720 F. Supp. 2d 229 (E.D.N.Y 2010). Thus, factual disputes are "inappropriate for resolution on a motion to dismiss." *Fin. Guar. Ins. Co. v. Putnam Advisory Co.*, LLC, 783 F.3d 395, 405 (2d Cir. 2015).

The court shall consider "the pleadings and exhibits attached thereto, statements or documents incorporated by reference in the pleadings, matters subject to judicial notice, and documents submitted by the moving party, so long as such documents either are in the possession of the party opposing the motion or were relied upon by that party in its pleadings." *Aristocrat Leisure*, 2005 U.S. Dist. LEXIS

16788, 2005 WL 1950116, at *3, quoting *Prentice v. Apfel*, 11 F. Supp. 2d 420, 424 (S.D.N.Y.1998) (citing *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993); *Seneca-Cayuga Tribe of Oklahoma v Town of Aurelius*, 233 FRD 278, 280 (N.D.N.Y. 2006).

ARGUMENT

POINT I: PLAINTIFF PLAUSIBLY ALLEGED POLICE OFFICERS VIOLATED HER PROCEDURAL DUE PROCESS RIGHTS

A. Legal standard to state claim for an unconstitutional deprivation of a property interest

Plaintiff had a constitutionally protected property interest in the field testing mandated by VTL§603-a. To state a claim for deprivation of a property interest without due process of law, a plaintiff must first identify a property interest protected by the Due Process Clause. *Harrington v. County of Suffolk*, 607 F3d 31, 34 (2d Cir 2010). Although some due process protections stem independently from the Fourteenth Amendment, state law may also create liberty or property interests entitled to due process protection. *Sealed v. Sealed*, 332 F.3d 51, 58 (2d Cir 2003). When the property interest is a benefit created by state law, a person must have "a legitimate claim of entitlement to it" rather than an abstract need or desire or a unilateral expectation of it. *Sealed,* 332 F.3d at 58 *citing Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756, 125 S. Ct 2796, 162 L. Ed. 2d 658 (2005); *see also*, *Kapps v. Wing*, 404 F.3rd 105, 113 (2d Cir 2005). The issue of entitlement can be

determined by the amount of discretion the government official retains in providing the benefit, and resolution of the issue hinges on whether, absent the denial there is certainty, or very strong likelihood, the benefit would have been provided. *Kapps*, 404 F.3d at 115.

While a statute that grants an official discretion would not create a constitutionally protected interest, a statute that requires an official make an initial finding before triggering a right to the benefit may still create a constitutionally protected interest. *Sealed,* 332 F.3d at 58, footnote 9 (initial required finding of "probable cause" … "may nonetheless mandate a defined outcome [and] create a protected interest for due process purposes"). Whether the statute requires an initial finding, as opposed to granting an official meaningful official discretion, can be determinative in finding whether the benefit is constitutionally protected. *Sealed,* 332 F3d at 56. Last, for the benefit to be constitutionally protected, a plaintiff must show that the alleged benefit is individual in nature and owed, as opposed to being an entirely generalized benefit. *Harrington*, 607 F3d at 34.

B. Plaintiff plausibly alleged a constitutionally protected interest in field testing mandated by VTL §603-a

Plaintiff respectfully submits that VTL §603-a created a constitutionally protected benefit for the families of those killed or seriously injured by intoxicated drivers. VTL §603-a mandated Police Officers to initiate field testing on Mr. Hagen to benefit Ms. Kern with evidence relating to his blood alcohol content. On or about

April 18, 2018, New York passed into law "AN ACT to amend the vehicle and traffic law, in relation to mandatory testing in the event of a motor vehicle collision resulting in injury or death." New York bill S. 5562-A and A. 7572. The language of the statute, and its legislative history, indicate that the law was enacted to remove discretion from police officers in favor of making field testing mandatory so that families of those killed or seriously injured or killed would have the proof necessary to hold intoxicated drivers accountable. (A-11 to A-13).

On the issue of whether the field testing was intended to be discretionary or mandatory, the bill's title states the testing is "mandatory" and its statutory language, as indicated below, is dispositive. Furthermore, the legislative history conclusively establishes that VTL §603-a was amended to mandate the field testing to benefit persons, such as Ms. Kern who, but for police officers initiating field testing, would not have proof that the driver who took their family member's life was intoxicated. Senator Helming, the sponsor of the bill, recognized that the families of those killed by drunk drivers were not able to hold those drivers accountable for their loss because New York police had an abysmal record of exercising discretion and field-testing surviving drivers. Senator Helming stated (A- 11 & A-12):

> Almost ¼ of all drivers in fatal crashes are impaired by alcohol. Only two states reported testing a smaller percentage of surviving drivers involved in fatal crashes. **This legislation requires a mandatory chemical test be performed when there is a serious personal injury or a death as a result of a motor vehicle accident** [Emphasis added].

> **We owe it to the families of those killed in these tragedies to bring drunk drivers to justice and hold them fully accountable for their reckless actions!!** [Emphasis added].

New York State Governor Andrew Cuomo issued a memorandum on the signing of the bill into law that stated "**[i]mpaired drivers who cause serious accidents must be held accountable for their actions.** [Emphasis added]" (A-11). Furthermore, the language in the statute conveys that the duties therein are mandatory by using the word "shall." VTL §603-a, as amended, provides in pertinent part:

> In addition to the requirements of section six hundred three of this article, whenever a motor-vehicle accident results in serious physical injury or death to a person … the police **shall conduct an investigation of such accident**. Such investigation shall be conducted for the purpose of making a determination of the following: the facts and circumstances of the accident,… the contributing factors, whether it can be determined if a violation or violations of this chapter occurred, and if so, the specific provisions of the chapter which were violated and by whom, and the cause of such accident shall be determined; **and when present at the scene of such accident the investigation officer shall also request that all operators of motor vehicles involved in such accident submit to field testing as defined in section eleven hundred ninety-four of this chapter provided there are reasonable grounds to believe such motor vehicle operator committed a serious traffic violation in the same accident.** The results of such field testing or refusal of such testing shall be included in the police investigation report. For the purposes of this section, "serious traffic violation" shall mean operating a motor vehicle in violation of any of the following provisions of this chapter: articles twenty-three, twenty-four, twenty-five, twenty-six, twenty-eight, twenty-nine and thirty and sections five hundred eleven, six hundred and twelve hundred twelve [Emphasis added].

Plaintiff submits that the use of the term "shall" in the statute is a positive command that means what it says and says what it means. In *New York State*

Citizens' Coalition for Children v. Poole, 922 F.3d 69 (2nd Cir 2019), the Second Circuit rejected an argument that a statute which used the term "shall" provides an official with discretion. The Court stated "[t]his construction is belied by the Act's text. As we pointed out earlier, the Act does not use permissive language—either in creating the obligation for the state to make payments to foster parents, or in defining what expenses those payments must account for. The Act, instead, uses clearly mandatory language—"shall"—binding states to make these payments." *NY State Citizens' Coalition for Children*, 922 F3d at 79.

The statute's required initial finding of "reasonable grounds to believe such motor vehicle operator committed a serious traffic violation in the same accident" does not channel officials with discretion. Rather, the statute mandates the field testing if the reasonable grounds exist. The statute leaves no discretion to the police officer because it specifically coupled "provided there are reasonable grounds to believe such motor vehicle operator committed a serious traffic violation" with a definition of "serious traffic violation." The statute specifically defined "serious traffic violation" as being "a violation of any of the following provisions of this chapter: articles twenty-three, twenty-four, twenty-five, twenty-six, twenty-eight, twenty-nine and thirty and sections five hundred eleven, six hundred and twelve hundred twelve." These are the sections of the VTL that relate to moving violations including rules of the road, traffic signs and marking, driving on the right side of the

roadway, right of way, turning and starting and signals on stopping and turning ("moving violation").

As such, the statute provides the official with no discretion and the officer must, when there are objectively reasonable grounds to believe that a driver committed a "moving violation," initiate field testing. Simply stated, if a police officer fails to initiate field testing when objectively reasonable grounds exist, he or she has acted unlawfully because the field testing required by VTL §603-a is mandatory in these circumstances.

In the instant matter, Ms. Kern plausibly alleged facts sufficient to conclude that objectively reasonable grounds existed to believe that Mr. Hagen had been drinking, failed to stop at a stop sign and caused the crash which resulted in Riley's death. (A-8 to A25). The crash occurred at an intersection which had a stop sign for those who had exited the Sycamore Club dram shop. (A-9 & A-10). Mr. Hagen had deep connections with Sycamore Club, which hosted the annual golf tournament in honor of his father Terry Hagen, a reputation with law enforcement for brushes with the law, and a reputation that he drank alcohol excessively. (A-9, A-10, A-24 & A-25). As such, objectively reasonable grounds existed that Mr. Hagen had committed a serious traffic violation and Police Officers were mandated to perform field testing. (A-8 to A25). Ms. Kern plausibly stated a claim that she had a constitutionally protected interest in the field testing mandated by VTL §603-a and that her

constitutional due process rights were violated by Police Officers' conduct. (A-8 to A-25).

C. The District Court erred in not distinguishing *Town of Castle Rock v Gonzales*, 545 US 748 (2005), *Harrington v. County of Suffolk*, 607 F3d 31 (2d Cir 2010) and *Stevens v. Webb*, 2014 US Dist LEXIS 37874, (E.D.N.Y. 2014), No. 12-CV-2909 (KAM).

Town of Castle Rock v Gonzales, 545 US 748, 760 (2005) should not have controlled the result herein because the subject statute, Colorado Rev. Stat.§18-6-803.5(3)(a) (b), provided that police "shall use every reasonable means to enforce a restraining order." This statute did not instruct police officers as to what the legislature considered "reasonable means." *Id.* The Supreme Court found that the Colorado legislature choice of words did not indicate a "true mandate" but rather indicated that the statute required "the practical necessity for discretion" because the "the suspected violator is not actually present and his whereabouts are unknown." *Town of Castle Rock v Gonzales*, 545 US at 760. The Supreme Court noted that it is "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances" and stated that:

> [a]gainst that backdrop, a true mandate of police action would require some stronger indication from the Colorado Legislature than "shall use every reasonable means to enforce a restraining order" (or even "shall arrest . . . or . . . seek a warrant"), §§ 18-6-803.5(3)(a), (b). That language is not perceptibly more mandatory than the Colorado statute which has long told municipal chiefs of police that they "shall pursue and arrest any person fleeing from justice in any part of the state" and that they "shall apprehend any person in the act of committing any offense . . . and, forthwith and without any warrant, bring such person

> before a . . . competent authority for examination and trial." Colo. Rev. Stat. § 31-4-112 (Lexis 2004). *Town of Castle Rock v Gonzales*, 545 US at 761.
>
> "[A] Colorado officer would likely have some discretion to determine that--despite probable cause to believe a restraining order has been violated--the violation's circumstances or competing duties counsel decisively against enforcement in a particular instance. The practical necessity for discretion is particularly apparent in a case such as this, where the suspected violator is not actually present and his whereabouts are unknown. In such circumstances, the statute does not appear to require officers to arrest but only to seek a warrant. That, however, would be an entitlement to nothing but procedure, which cannot be the basis for a property interest." *Town of Castle Rock v Gonzales*, 545 US at 750.

VTL§603-a, on the other hand, left nothing to the discretion of the Police Officer. VTL§603-a instructs Police Officer to initiate the field testing if (1) reasonable grounds existed that an operator of a vehicle had committed a serious traffic violation, which the legislature specifically defined, and (2) when that driver is "present at the scene of such accident." As such, complying with VTL§603-does not require the officer to decide what resources would be "reasonable means" to comply with the statute's mandate. Furthermore, there is no "practice necessity for discretion" with compliance with VTL§603-a because the statute's language limits the mandate to a circumstance when initiating the field testing would not involve the use of any significant police resource.

The District Court also erred in holding that *Harrington* and *Stevens* were of precedential value (A-139-140) because the fatal motor vehicle crashes at issue in

those cases, October 11, 2006 and July 10, 2011 respectively, occurred years before New York passed the law which amended VTL §603-a to mandate that police perform field testing. *Harrington.* 607 F3d at 32; *Stevens v. Webb*, 2014 US Dist LEXIS 37874, at *2. Plaintiff submits that the legislative history of VTL §603-a demonstrates the mandate for field testing was passed into law in New York to avoid the results of *Harrington* and *Stevens* and put a stop to New York's police officers abysmal field testing record which was taking from the surviving family the proof of intoxication necessary to hold the intoxicated driver responsible.

Furthermore, in *Harrington,* the plaintiff relied upon Suffolk County Code §C13-6 which, unlike VTL §603-a, provided no specially defined outcome to benefit any particular group of persons. Suffolk County Code §C13-6 very generally provides that "[i]t shall be the duty of the Police Department to preserve the public peace, prevent crime, detect and arrest offenders, protect the right of persons and property and enforce all laws and ordinances applicable to the county." The Second Circuit affirmed the District Court's dismissal finding that Suffolk County Code §C13-6 conferred a merely discretionary benefit on the public generally and did not create an individual entitlement. *Harrington,* 607 F3d at 36. VTL §603-a, on the other hand, creates a clearly defined and mandated outcome of field testing in accidents involving serious injury or death.

POINT II: PLAINTIFF HAS STATED A PLAUSIBLE CAUSE OF ACTION FOR VIOLATION OF HER CONSTITUTIONALLY PROTECTED BACKWARDS-LOOKING RIGHT OF ACCESS TO THE COURTS

A. Legal standard to state a claim for a backwards-looking right of access to the courts claim

In *Christopher v. Harbury*, 536 U.S 403, 122 S. Ct. 2179, 153 L. Ed. 413 (2002) the Supreme Court assumed, without deciding, the viability of backwards-looking right of access claims and described them in aid of a class of suits:

> that cannot now be tried (or tried with all material evidence), no matter what official action may be in the future. The official acts claimed to have denied access may allegedly have caused the loss or inadequate settlement of a meritorious case, *e.g., Foster v. Lake Jackson*, 28 F.3d 425, 429 (CA51994); *Bell v. Milwaukee*, 746 F.2d 1205, 1261 (CA7 1984) ("The cover-up and resistance of the investigating police officers rendered hollow [the plaintiff's] right to seek redress"), the loss of an opportunity to sue, *e.g., Swekel v. River Rouge*, 119 F.3d 1259, 1261 (CA6 1997) (police cover-up extended throughout "time to file suit … under ... statute of limitations"), or the loss of an opportunity to seek some particular order of relief, as *Harbury* alleges here. These cases do not look forward to a class of future litigation, but backward to a time when specific litigation ended poorly, or could not have commenced, or could have produced a remedy subsequently unobtainable. The ultimate object of these sorts of access claims, then, is not the judgment in a further lawsuit, but simply the judgment in the access claim itself, in providing relief obtainable in no other suit in the future." *Harbury*, *supra,* 536 U.S. at 412-414.

The Supreme Court stated that a plaintiff, in alleging a backwards-looking right of access claim, is required to describe the predicate underlying claims alleged to have been impaired or lost well enough to apply a "nonfrivolous" test and show

that the "arguable" nature of the underlying claim is more than hope. *Harbury*, 536 U.S. at 416.

B. Plaintiff plausibly alleged that Police Officers' conduct violated her right of access to the courts.

Plaintiff respectfully submits that right of access to the courts is a fundamental right protected by the United States Constitution and that the Second Circuit should affirmatively recognized the claims are viable in the circuit. This Court has assumed, but not decided that the claims are viable in the Second Circuit. *Oliva, supra,* 630 F App'x at 45 ("[a]ssuming, *arguendo*, that backwards-looking access to courts claims are otherwise viable in this Circuit"). This Court has held that a legal cause of action is "species of property protected by the Fourteenth Amendment's Due Process Clause." *N.Y. State NOW v. Pataki, 261 F.3d 156, 163* (2nd Cir 2001); *Polk v. Kramarsky*, 711 F.2d 505, 508-09 (2d Cir. 1983). The right of access to the courts finds support in several provisions of the Constitution in addition to the Due Process Clause of the Fourteenth Amendment, *Wolff v. McDonnell*, 418 U.S. 539, 579, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974), including the Equal Protection Clause, *Pennsylvania v. Finley*, 481 U.S. 551, 557, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987), the First Amendment, *Turner v. Safley*, 482 U.S. 78, 84, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)(citing *Johnson v. Avery*, 393 U.S. 482, 89 S. Ct. 708, 21 L. Ed. 2d 689 (1969), and the Privileges and Immunities Clause of Article IV, *see,*

e.g., Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148, 52 L. Ed. 143, 28 S. Ct. 34 (1907); *Smith v. Maschner*, 899 F.2d 940, 947 (10th Cir. 1990).

The Sixth Circuit Court of Appeals explained a backwards-looking right of access claims as follows:

> "the right of access in its most formal manifestation protects a person's right to physically access the court system. Without more, however, such an important right would ring hollow in the halls of justice. See *Chambers*, 207 U.S. at 148 ("In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . . ."). Access to courts does not only protect one's right to physically enter the courthouse halls, but also insures that the access to courts will be "adequate, effective and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977). Therefore, if a party engages in actions that effectively cover-up evidence and this action renders a plaintiff's state court remedy ineffective, they have violated his right of access to the courts. See *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984) ("To deny such access defendants need not literally bar the courthouse door or attack plaintiffs' witnesses."). Otherwise, to what avail would it be to arm a person with such a constitutional right, when the courtroom door can be hermetically sealed by a functionary who destroys the evidence crucial to his case. A contrary interpretation of this right would encourage "police officials to conceal the circumstances relating to unlawful killing committed under color of state law and other deprivations of federal rights Section 1983 was designed to remedy. *Swekel v City of Riv. Rouge*, 119 F3d 1259, 1262 (6th Cir 1997).

Nearly all Circuit Courts of Appeals have recognized the viability of backwards-looking rights of access to the courts claims. *Williams v Boston*, 784 F2d 430, 435 (1st Cir 1986)("An official cover-up may violate section 1983 if it deprives the plaintiff of his right of access to the courts"); *Watson v Wingard*, 782 F App'x

214, 217 (3d Cir 2019)*(*To demonstrate an actual injury, a plaintiff must show that the defendant's conduct hindered his attempt to litigate a non-frivolous claim); *Ryland v Shapiro*, 708 F2d 967, 973 (5th Cir 1983)(plaintiffs "have a substantive constitutional right of access to the courts as well as a property right in the wrongful death action"); *Green v City of Southfield*, 925 F3d 281, 285 (6th Cir 2019)(the Constitution protects an individual's access to the judicial system—the right to bring a non-frivolous claim in a court of law and that right extends to protection from government conspiracies to destroy evidence if those actions prevent a plaintiff from having an "adequate remedy on the underlying claim."); *Harer v Casey*, 962 F3d 299, 306 (7th Cir 2020)(We have consistently highlighted that "[t]he cornerstone of our decision in *Bell* was that the conspiracy had prevented a full and open disclosure of facts crucial to the cause of action, rendering hollow the plaintiffs' right of access."); *Scheeler v City of St. Cloud*, 402 F3d 826, 831 (8th Cir 2005)(claim recognized where the defendants acted with some intentional motivation to restrict their access to the courts); *Penton v Pool*, 724 F App'x 546, 549 (9th Cir 2018)(official withholding of plaintiff's mail frustrated his ability to make claim and stated a backwards-looking access claim). *Bird v Easton*, 2021 U.S. App. LEXIS 17448, at *9-10 (10th Cir June 11, 2021)(Bird points to *Christopher v. Harbury*, 536 U.S. 403, 412, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002), in which the Supreme Court quoted the court of appeals as stating, "'[W]e think it should be

obvious to public officials that they may not affirmatively mislead citizens for the purpose of protecting themselves from suit.'"); *Han-Noggle v City of Albuquerque*, 632 F App'x 476, 480 (10th Cir 2015) (discussing backwards looking right of access claim and holding that the plaintiff's complaint must provide a "theory as to how [decedent] died or who allegedly caused her death, let alone the type of action that [decedent] would have had against the party at fault had she survived."); *Chappell v Rich*, 340 F3d 1279, 1283 (11th Cir 2003)(interference with the right of court access by state agents who intentionally conceal the true facts about a crime may be actionable as a deprivation of constitutional rights under 42 U.S.C. §§ 1983).

The Second Circuit discussed a backwards-looking right of access to the courts claim in *Sousa v Marquez, 702 F3d 124* (2d Cir 2012) and again in *Oliva, supra,* 630 F App'x 43. In *Sousa* a former employee at the Connecticut Department of Environmental Protection, claimed that he failed to prevail in a prior employment-related suit because of false statements and deliberate omissions in an investigative report issued by the defendant-appellee. However, unlike Ms. Kern herein, the plaintiff in *Sousa* had independent knowledge of the underlying facts that were purportedly omitted and falsely stated in the report. *Sousa, 702 F3d at 129*. The plaintiff's knowledge of the key facts that were omitted and falsely stated in the report was a determinative factor for the Second Circuit. The Second Circuit rejected the plaintiff's claim stating "even assuming that so-called "backward looking" right

of access claims are viable in this Circuit, such claims are not cognizable if the plaintiff, claiming that the government concealed or manipulated relevant facts, was aware at the time of the earlier lawsuit of the facts giving rise to his claim. A plaintiff with knowledge of the crucial facts and an opportunity to rebut opposing evidence *does* have adequate access to a judicial remedy." *Sousa,* 702 F3d at 130.

In *Oliva,* the plaintiff alleged that defendants had violated their constitutionally protected right of access to courts by recklessly or intentionally failing to properly investigate the tragic automobile accident death of their daughter. *Oliva*, 630 F App'x at 44. The Second Circuit again assumed, but did not decide, these types of access claims were viable in the circuit:

> to succeed on an access to courts claim, a plaintiff must show that the defendant caused the plaintiff injury or, put less succinctly, that the defendant took or was responsible for actions that had the actual effect of frustrating the plaintiff's effort to pursue a legal claim. *See id.* at 129-30; see also *Harbury*, 536 U.S. at 415 ("[T]he [access] right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court."); *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003) (discussing this actual injury requirement); *Monsky v. Moraghan*, 127 F.3d 243, 247 (2d Cir. 1997) ("In order to establish a violation of a right of access to courts, a plaintiff must demonstrate that a defendant caused 'actual injury,' i.e., took or was responsible for actions that 'hindered [a plaintiff's] efforts to pursue a legal claim.'" (citation omitted) (quoting *Lewis v. Casey*, 518 U.S. 343, 349, 351, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). *Oliva*, 630 F App'x at 45.

Significantly, although the Second Circuit affirmed the District Court's dismissal, the court explicitly rejected the District Court's holding that a plaintiff must be 'completely foreclosed' from bring the underlying wrongful death lawsuit to

state a cause of action. *Oliva,* 630 F App'x at 44. Although the Second Circuit affirmed the District Court's dismissal, it did so on the narrow grounds that plaintiffs "alleged no facts sufficient to make it plausible that - inadequate or not - the amount of the award turned on any acts or omissions of the Town of Greece Police Department" and because plaintiffs "failed to plead facts sufficient to suggest that, insofar as they have failed to recover adequate damages on their hypothetical or actual wrongful death suits, that failure may be attributed to any acts or omissions of the Defendants." O*liva*, 630 F App'x at 44-45.

In sum, in *Olvia*, the Second Circuit addressed and rejected the complete foreclosure standard, and held that a claim is stated if a plaintiff alleges official acts had the actual effect of frustrating the plaintiff's effort to pursue a legal claim, or have caused the loss or inadequate settlement of a meritorious case, the loss of an opportunity to sue, or the loss of an opportunity to seek some particular order of relief states a cause the cause of action. *Oliva*, 630 F App'x at 44 – 45.

In *Small v City of NY*, 274 F Supp 2d 271, 275 (E.D.N.Y. 2003) the plaintiff administrator brought a backwards-looking right of access claim alleging, much like Ms. Kern herein, that the police officers who responded to the motor vehicle accident failed to take sobriety tests, mishandled, lost and destroyed evidence from the crime scene including photographs and other evidence which indicated that the deceased were not at fault in the accident. Plaintiffs in *Small,* as did Ms. Kern herein, brought

New York common law wrongful death claim against the responsible driver and a dram shop claim against the bar where the driver had been drinking. *Small,* 274 F Supp at 274. The District Court found that the plaintiff had stated a backwards-looking right of access cause of action:

> [P]laintiffs in this case have identified, through their opposition papers and at oral argument, two separate forms of recovery, conscious pain and suffering and punitive damages, and one defense, comparative negligence, which, as a result of defendants' alleged acts of obstruction, "cannot now be tried (or tried with all material evidence)." *Id.* at 414. Therefore, unlike the plaintiff in *Harbury,* plaintiffs in this case have specifically identified "the cause of action supposed to have been lost, and … the remedy being sought." *Id.* at 418. Plaintiffs allege that the defendant officers destroyed crime scene photographs, removed the victims' socks and shoes from the crosswalk, intimidated witnesses, and pressured witness Rosa Cintron to change her statement that the victims were legally crossing the street with the light and in the crosswalk at the time of the accident. Essentially, plaintiffs allege that they have been deprived of evidence as to what occurred at the moment of impact and in the crucial hours following impact. These allegations suffice to show that the obstructive conduct of the defendant police officers will limit plaintiffs' ability to disprove Officer Gray's comparative negligence defense. In addition, these allegations suffice to show that the defendant officers' acts will limit plaintiffs' ability to prove the extent of the victims' conscious pain and suffering and their entitlement to punitive damages. In *Harbury,* the Supreme Court specifically held that an inability to prove some aspect of a claim, such that full recovery on that claim is no longer possible, may serve as a basis for a denial of access claim. 536 U.S. at 423-428 n.22. *Small,* 274 F Supp 2d at 278-279.

The Northern District of New York recognized a backwards-looking right of access to the courts claim in *DeMeo v. Kean*, 2011 U.S. Dist. LEXIS 18084, (N.D.N.Y 2011) No. 1:07- CV-1275 (DNH). *DeMeo* involved an underlying excessive force case, but since the defendant police officer intentionally dispersed

eyewitnesses, rather than recording their identity, the Court found that the loss of these eyewitnesses' accounts directly impacted DeMeo's ability to prosecute his present claims with all material evidence and to defend against defendants' assertion that he contributed to his own injuries by stumbling into a wall. As such, the District Court held that a viable right of access to the courts claim was alleged. *DeMeo*, 2011 US Dist LEXIS 18084, at *6.

Ms. Kern, plaintiff herein, has plausibly alleged a backwards-looking right of access to the court's claim. (A-6 to A-35). Unlike the plaintiffs *Sousa* and *Oliva,* the disposal of the evidence, cover up, and failure to perform the duties mandated by VTL§603-a including field testing Mr. Hagen, has impaired Ms. Kern's causes of action against him and the adjacent dram shop Sycamore Club. (A-6 to A-35). Ms. Kern's complaint alleged state law causes of action against Mr. Hagen for wrongful death and conscious pain and suffering and sought compensatory and punitive damages. (A-38 & A-39). Plaintiff also alleged a dram shop cause of action against Sycamore Club. (A-39 & A-40). Mr. Hagen and Sycamore Club have filed answers which deny her allegations (A-3 & A-4 Dkt Nos. 10 & 20). Mr. Hagen has further asserted an affirmative defense asserting that he was not negligent, and that the accident was caused by Riley's negligence. (A-3 Dkt No. 10 at ¶4).

As a result of Police Officers' misconduct, the evidence including proof of intoxication has been forever lost. (A-6 to A-35). Ms. Kern has been impaired by

Police Officers' conduct because she does not have proof that will allow her to hold Sycamore Club liable on her alleged dram shop cause of action and/or proof that will allow her to be able to hold Mr. Hagen fully responsible for the crash and recover punitive damages from him. (A-6 to A-35). As such, the instant matter fit squarely within the standard of *Oliva* in that Police Officers' conduct has resulted in the loss of pertinent evidence and "caused the loss or inadequate settlement of a meritorious case, the loss of an opportunity to sue, or the loss of an opportunity to seek some particular order of relief." *Oliva*, 630 F App'x at 44 – 45. Unlike the plaintiffs in *Sousa* and *Oliva,* Ms. Kern, does not have proof of the crucial facts, including how the crash occurred and/or Mr. Hagen's blood alcohol content. (A-6 to A-35).

Plaintiff respectfully submits that the instant matter is analogous to *Small* and *DeMeo* because in all three cases it was alleged that intentional police conduct impaired the plaintiffs' underlying causes of actions and caused plaintiff to be unable to prove some aspect of a claim alleged such that full recovery on each of the underlying claims was no longer possible. (A-6 to A-35).

C. The District Court erred in finding that Police Officer's conduct was merely negligent

The Direct Court erred in finding that the Police Officers' conduct was merely negligent (A-142):

> "Indeed, although the allegedly negligent investigation by Town defendants may impair Kern's ability to "reconstruct the accident and prove [Hagen] responsible" and succeed on her state law causes of

> action, (Dkt. No. 22 at 17-22), such claims have not been completely foreclosed. See *Oliva v. Town of Greece*, 71 F. Supp. 3d 368, 375 (W.D.N.Y. 2014), aff'd sub nom. *Oliva v. Town of Greece*, 630 F. App'x 43 (2d Cir. 2015)."

Ms. Kern alleged an intentional police coverup of evidence and fabrication purposefully undertaken to shield Mr. Hagen and Sycamore Club from liability. (A-6 to A-35). Plaintiff submits that the District Court erred in finding the police officers' conduct was merely "negligent" since the Court was required to accept plaintiff's allegations as true and draw all inferences in favor of plaintiff. *Cargo Partner AG, supra,* 352 F.3d at 44.

D. The District Court erred in holding that the legal standard for a backwards-looking right of access to the courts claim requires that the underlying claims to have been completely foreclosed by official conduct.

The District Court erred in holding that a plaintiff must allege "conclusive foreclosure." (A-142). As mentioned above, the Second Circuit rejected the complete foreclosure standard, and held that a claim is stated if a plaintiff alleges official acts had the actual effect of frustrating the plaintiff's effort to pursue a legal claim or have caused the loss or inadequate settlement of a meritorious case, the loss of an opportunity to sue, or the loss of an opportunity to seek some particular order of relief. *Oliva*, 630 F App'x at 44 – 45. While plaintiff pled the underlying state law causes of actions, unlike the plaintiffs in *Sousa* and *Oliva,* Ms. Kern does not have proof of the crucial facts, including how the motor vehicle crash occurred and Mr. Hagen's blood alcohol content. (A-6 to A-35). Police Officers intentional conduct

has impaired Ms. Kern's underlying lawsuits because she does not have the relevant evidence to prove how the crash occurred and that Mr. Hagen's level of intoxication.

POINT III: PLAINTIFF STATED A PLAUSIBLE *MONELL* CLAIM AGAINST THE TOWN OF COEYMANS

The District Court erred in dismissing plaintiff's *Monell* claim. Judge Sharpe stated in his decision dismissing the claim:

> Town of Coeymans argues that, because there is no underlying constitutional violation, there can be no *Monell* liability. (Dkt. No. 21, Attach. 1 at 14-17.) The court agrees. A municipality may be liable under Section 1983 if a municipal "policy or custom" causes "deprivation of rights protected by the Constitution." *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 690-91 (1978). Because Kern has not adequately alleged a constitutional violation related to the Town, Kern's *Monell* claim fails. *See Stevens*, 2014 WL 1154246, at *8. Accordingly, Town defendants' motion to dismiss Kern's *Monell* claim is granted, and the claim is dismissed.

Plaintiff respectfully submits that, for the reasons stated above, the District Court erred in finding that plaintiff had not adequately alleged that Police Officers violated plaintiff's constitutional rights. Furthermore, although not discussed by the District Court, Ms. Kern alleged a plausible *Monell* claim against Coeymans. (A-35 to A-38). To establish *Monell* liability a plaintiff must demonstrate that the deprivation of her constitutional rights was "caused by a governmental custom, policy, or usage of the municipality." *Jones v. Town of East Haven*, 691 F.3d 72, 80 (2d Cir. 2012) (citing *Monell*, 436 U.S. at 690-91). The existence of a municipal policy that gives rise to *Monell* liability can be established in four ways: (1) a formal

policy endorsed by the municipality, *Turpin v. Mailet,* 619 F.2d 196, 199 (2d Cir.1980); (2) actions directed by the government's "authorized decisionmakers" or "those who establish governmental policy," *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986); (3) a persistent and widespread practice that amounts to a custom of which policymakers must have been aware, see *Turpin*, 619 F.2d at 199; or (4) a "constitutional violation resulting from [policymakers'] failure to train municipal employees," *City of Canton v. Harris*, 489 U.S. 378, 380, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). Once a plaintiff has demonstrated the existence of a municipal policy, a plaintiff must then establish a causal connection, or an "affirmative link," between the policy and the deprivation of his constitutional rights. *Vippolis v. Vill. of Haverstraw*, 768 F.2d 40, 44 (2d Cir. 1985); accord *Bd. of the Cty. Comm'rs v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997) (holding that plaintiff must "demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged"). *Deferio v City of Syracuse*, 770 F App'x 587, 589-590 (2d Cir 2019).

In the instant matter, Ms. Kern has alleged, *inter alia*, that Police Chief Contento (1) had policy making authority and set policy and procedures for CPD and the law enforcement activities in Coeymans (A-23) and (2) directed and participated in the unconstitutional takings. (A-6 to A-37). As such, Ms. Kern stated a plausible *Monell* claim. E.g., *Pembaur*, 475 U.S. at 481.

Ms. Kern also alleged an additional basis of *Monell* liability premised upon CPD's history of misconduct of using their official positions to fail to preserve evidence and planted evidence so as to create a false narrative as to the contributing factors of a motor vehicle accident. (A- 36 & A-37). This conduct, and its continuation, supported plaintiff's allegations that CPD allowed its officers to use their office to favor persons and protect them from civil liability, and that its failure to train its police officers that using their official positions to protect favored persons from civil liability was not permitted. (A- 6 to A -37); *Kryzkowski* 1:06-CV-835 (GLS/DRH) at Dkt No. 40, Kryzkowski Opposition, pages 3 -15 and Exhibit 9, pages 57 – 79, 101, 160, Exhibit 10 at pages 28, 127, 143 and 145, Exhibit 13 at pages 66-67 and Exhibit 23. A policy need not be officially promulgated for a municipality to face liability. *Green v. City of New York*, 465 F.3d 65, 80 (2d. Cir. 2006)("The alleged custom or practice need not be embodied in a rule or regulation, however, the alleged practice must be so manifest as to imply the constructive acquiescence of senior policy-making officials."); *Reynolds v. Giuliani*, 506 F.3d 183, 192 (2d Cir. 2007) ("*Monell's* policy or custom requirement is satisfied where a local government is faced with a pattern of misconduct and does nothing, compelling the conclusion that the local government has acquiesced in or tacitly authorized its subordinates' unlawful actions.")

CONCLUSION

For all the forgoing reasons, plaintiff Emily Kern respectfully requests that this Court reverse the decision and order of the District Court, reinstate her claims against Defendants-Appellees and remand the case to District Court for further proceedings.

Dated: White Plains, NY
August 26, 2021

Respectfully submitted,

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Dated: White Plains, NY
August 26, 2021

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